

PLM-II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

10,673

FILEB-193965

DATE: July 9, 1979

MATTER OF: Harold S. Fenner - Bankruptcy Order

DIGEST: At the time of his death a VA employee was subject to a Wage Earners' Plan under Chapter XIII of the Bankruptcy Act. The Bankruptcy Judge issued an order requiring unpaid compensation due the employee at the time of death to be paid to the Trustee of the Chapter XIII Plan. The VA had also received a claim from surviving children under 5 U.S.C. § 5582, seeking the same money. The order of the Bankruptcy Judge may not be followed since there is no waiver of sovereign immunity sufficient to permit enforcement of the order against United States in the face of the competing claim based upon a specific statutorily granted right.

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This matter arises from a submission by the Veterans Administration (VA) Hospital in East Orange, New Jersey, in which they requested guidance regarding the disposition of unpaid compensation owed to a VA employee, Mr. Harold S. Fenner, Jr., at the time of his death on November 4, 1977.

The VA has received competing claims for the unpaid compensation from a Trustee in Bankruptcy and the deceased employee's children. We hold that, the children are entitled to the compensation as provided in 5 U.S.C. § 5582 (1976).

On April 19, 1973, an order confirming a Wage Earners' Plan under Chapter XIII of the Bankruptcy Act, 11 U.S.C. §§ 1011 et seq., submitted by Harold S. Fenner and Doris F. Fenner, his wife, was entered in the United States District Court for the District of New Jersey. However, prior to his death Mr. Fenner was divorced, and, thus, he left no surviving spouse. Under the terms of the order he was to make weekly payments of \$32 to the Trustee appointed to administer his plan. We have ascertained that his salary checks were always sent to his home address and at no time did he execute an assignment authorizing the VA to send his salary directly to the Trustee.

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As far as can be determined from the record before us, Mr. Fenner complied with the Wage Earners' Plan until the time of his death. By letter of May 30, 1978, Jerome J. La Penna, Esq., as counsel to Mr. Fenner in the bankruptcy proceeding, requested that the VA pay over to the Trustee the unpaid compensation owed to him at the time of his death, an amount described as "in excess of \$800." The VA declined to voluntarily pay this amount to the Trustee because two of Mr. Fenner's surviving children, Deborah C. Lepore and Gregory S. Fenner had filed a claim for the same fund. On or about July 26, 1978, Mr. Theodore S. Meth, the Trustee of Mr. Fenner's Wage Earners' Plan, applied to the Bankruptcy Judge for an order directing the VA to pay the unpaid salary to him as Trustee. An Order to that effect was entered on July 26, 1978, and forwarded to the VA by Mr. La Penna on August 1, 1978.

The disposition of money due at the time of death to an employee of the Government is controlled by the provisions of 5 U.S.C. § 5582 which provides in part:

"(b) In order to facilitate the settlement of the accounts of deceased employees, money due an employee at the time of his death shall be paid to the person or persons surviving at the date of death, in the following order of precedence, and the payment bars recovery by another person of amounts so paid:

"First, to the beneficiary or beneficiaries designated by the employee in a writing received in the employing agency before his death.

"Second, if there is no designated beneficiary, to the widow or widower of the employee.

"Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.

"Fourth, if none of the above, to the parents of the employee or the survivor of them.

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"Fifth, if none of the above, to the duly appointed legal representative of the estate of the employee.

"Sixth, if none of the above, to the person or persons entitled under the laws of the domicile of the employee at the time of his death."

Mr. Fenner had not designated a beneficiary as permitted by that provision, nor, as we noted above, was he survived by a spouse. Therefore, his surviving children held the highest position in the order of precedence established by the statute. This statute has been considered in Ashton v. Ashton, 117 A. 2d 459 (D.C. Mun. Ct. App. 1955), which held that the disposition of the unpaid salary of a deceased Federal employee was governed by the quoted provision, not the local laws regarding decedents' estates. We have also reached that conclusion. See 51 Comp. Gen. 483 (1972).

The order entered by the Bankruptcy Judge is directly contradictory to the provisions of 5 U.S.C. § 5582, and it is, therefore, necessary to examine the force and effect of an order entered against the United States in a Bankruptcy proceeding. This issue was considered in United States v. Krakover, 377 F. 2d 104 (10 Cir. 1967) cert. denied 389 U.S. 845. In that case the Bankruptcy Referee ordered the United States, as the employer of the debtor, to pay over a certain sum from the debtor-employee's wages directly to the Trustee who was administering the Wage Earners' Plan. The Court of Appeals held that the Referee's order was not enforceable against the United States, since there was no waiver of sovereign immunity. The court went on to say that the same result could have been accomplished by ordering the employee to assign his salary checks to the Trustee. Such an order would then be enforceable against the employee.

In 47 Comp. Gen. 522 (1968), we were asked to rule on the propriety of an Air Force procedure of requiring finance officers to respond to court orders issued under Chapter XIII Wage Earners' Plans in light of Krakover. We held that the Air Force could continue to follow their policy since the orders would be enforceable against the employee, and, thus, the Government would get good acquittances against its employees. It must be remembered that there were no competing claims in that situation. The employee had voluntarily

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entered into the Wage Earners' Plan, and, if the Government did not respond to the order voluntarily, the same end could be achieved by entering an appropriate order against the employee himself, which could then be enforced by the court. In effect, the employee's filing of the Plan was treated as a voluntary assignment to the Trustee when the employee failed to comply with the Plan's provisions.

Here, on the other hand, there is a specific, competing claim, based upon a statute that has been uniformly held to be controlling as to the distribution of unpaid compensation due an employee at the time of his death. The informal policy endorsed in our decision cannot overcome the statutory mandate of 5 U.S.C. § 5582. Therefore, the compensation due Mr. Fenner at the time of his death should be paid not to the Trustee, but to the appropriate claimants under the statute who appear to be his surviving children.

Accordingly, the VA should dispose of the unpaid compensation due Mr. Fenner at the time of his death as is required by 5 U.S.C. § 5582, not as specified in the July 26, 1978 Order of the Bankruptcy Judge.

The children's claim form is, therefore, being returned to the VA. We are forwarding a copy of this decision to the Department of Justice should they deem it advisable to take appropriate action to dissolve the July 26, 1978 Order.


Deputy Comptroller General
of the United States